



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2014-0177]

Crash Preventability Demonstration Program

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: On July 12, 2016, FMCSA proposed a crash preventability demonstration program. Based on the feedback received in response to the Federal Register notice, FMCSA announces the initiation of a crash preventability demonstration program in which the Agency would accept requests for data review (RDRs) to evaluate the preventability of certain categories of crashes through its national data correction system known as DataQs. This notice describes the crash types that will qualify for the demonstration program, the process for submitting RDRs to evaluate the preventability of a crash, how decisions on preventability will be displayed in Agency systems, and the data to be collected through this program for use in future decisions about a longer-term crash preventability program.

DATES: The crash preventability demonstration program will begin accepting RDRs on August 1, 2017, for crashes that occur on or after June 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Catterson Oh, Compliance Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590, Telephone 202-366-6160 or by email: Catterson.Oh@dot.gov. If

you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION

Background

Since its implementation in 2010, the Safety Measurement System (SMS) has used safety performance information in the Behavior Analysis and Safety Improvement Categories (BASICS) plus recordable crashes involving commercial motor vehicles (CMVs), that are submitted by the States through the Agency's Motor Carrier Management Information System (MCMIS), to prioritize carriers for safety interventions (75 FR 18256). The Agency uses the definition of “accident” in 49 CFR 390.5 to identify those crashes that must be maintained by the motor carrier in an accident register under 49 CFR 390.15. These include crashes resulting in fatalities, bodily injuries requiring immediate medical treatment away from the scene of the crash, or a vehicle being towed from the scene because of disabling damage. These same crashes must be reported by the States to FMCSA, through MCMIS, if the CMV has an actual weight (i.e., gross vehicle weight) or gross vehicle weight rating of 10,001 or more pounds or a gross combination weight rating of 10,001 or more pounds and is used on public highways. In addition, crashes must be reported if the CMV is designed to transport nine or more people, including the driver, and the motor carrier receives compensation, and if a CMV in the crash is designed to transport 16 or more people, including the driver regardless of compensation. Additionally, if any motor vehicle in the crash is required to display a hazardous materials placard, regardless of the weight of the vehicle, it must be reported to

FMCSA by the State. The crash data reported to FMCSA by the States does not specify whether or not the crash was preventable by the CMV driver.

The Crash Indicator BASIC uses crashes from the previous 24 months to calculate a percentile for a motor carrier. SMS weights crashes based on crash severity, with more weight given to fatality and injury crashes than those that resulted in a vehicle being towed from the scene with no injuries or fatalities. In addition, the crashes are time weighted, with more recent crashes having more weight. All reportable crashes are included in the Crash Indicator BASIC regardless of preventability.

While the public SMS website provides a list of the recordable crashes for the motor carrier, the Crash Indicator BASIC percentiles have never been publicly available. The Crash Indicator BASIC percentiles are, however, available to motor carriers who log in to view their own data, as well as to FMCSA and law enforcement users.

Stakeholders have expressed concern that the Crash Indicator BASIC may not identify the highest-risk motor carriers for interventions and that the listing of crashes on the public website, without an indication of preventability, can give an inaccurate impression about the risk posed by the company.

On January 23, 2015, FMCSA announced the results of the Agency's study on the feasibility of using a motor carrier's role in crashes in the assessment of the company's safety (80 FR 3719). This study analyzed whether police accident reports provide sufficient, consistent, and reliable information to support crash-weighting determinations; whether a crash weighting determination process would offer an even stronger predictor of crash risk than overall crash involvement and how crash weighting would be

implemented in the Agency's SMS; and how FMCSA might manage a process for making crash-weighting determinations, including the acceptance of public input.

Among the public comments to FMCSA's January 23, 2015, Federal Register notice, the American Trucking Associations (ATA) provided a list of certain types of not preventable crashes and suggested that FMCSA establish a process by which documents demonstrating that the crash was not preventable could be submitted to justify removing these crashes from the motor carriers' records.

Based on ATA's recommendations and other feedback received in response to the January 2015 Federal Register notice, on July 12, 2016, FMCSA proposed, in a Federal Register notice, a demonstration program to determine the efficacy of preventability determinations on certain types of crashes that are generally less complex. (81 FR 45210) The Agency proposed to accept RDRs to evaluate the preventability of certain categories of crashes through its national data correction system known as DataQs. It proposed that a crash challenged through an RDR would be found not preventable when documentation submitted with the RDR established that the crash was not preventable.

Demonstration Program Details

Types of Crashes

The Agency's July 2016 Federal Register notice advised that a crash would be considered not preventable if the documentation submitted by the motor carrier or driver established that the CMV was struck by a motorist who was convicted of one of the four following offenses or a related offense:

1. Driving under the influence;
2. Driving the wrong direction;

3. Striking the CMV in the rear; or
4. Striking the CMV while it was legally stopped.

While there were comments opposing the demonstration program, there were no comments opposing the categorization of the four proposed crash scenarios as not preventable; so these categories will be retained in the demonstration program as crashes that may be challenged by the motor carrier through an RDR.

Additionally, FMCSA advised in the July 2016 Federal Register notice that RDRs could also be submitted:

1. When an individual committed suicide by stepping or driving in front of the CMV;
2. When the CMV was incapacitated by an animal in the roadway; or
3. When the crash was the result of an infrastructure failure.

Comments to the Federal Register notice largely supported identifying these additional proposed crash scenarios as not preventable. Numerous commenters suggested expanding the list of crashes to include vehicles running stop signs and red lights, crashes involving two or fewer vehicles, or any crash where the other driver was cited. Many commenters provided specific examples of crashes their drivers were involved in that they felt were not preventable. For example, Bill Puckett discussed an incident where a driver was operating on the right hand shoulder and crashed into the CMV while the CMV was making a right turn.

The Institute of Makers of Explosives recommended including crashes where vehicles are struck by debris, including trees and falling rocks. The American Bus

Association recommended including crashes where vehicles are struck by cargo from another vehicle.

After consideration of these comments, FMCSA modifies the original list of not preventable crash scenarios to include crashes involving an unattended CMV that is legally stopped or parked, and crashes involving road debris or cargo from another vehicle. FMCSA believes that these crash scenarios are similar to the scenarios originally proposed because they generally are not complex. However, other crash scenarios proposed by commenters are more complex and would require more analysis and probably generate less consistent findings.

Therefore, the Agency has decided that the crashes that may be reviewed using the RDR process during the demonstration program include:

1. When the CMV was struck by a motorist driving under the influence (or related offense);
2. When the CMV was struck by a motorist driving the wrong direction;
3. When the CMV was struck in the rear;
4. When the CMV was struck while it was legally stopped or parked, including when the vehicle was unattended;
5. When the CMV struck an individual committing or attempting to commit suicide by stepping or driving in front of the CMV;
6. When the CMV sustained disabling damage after striking an animal in the roadway;
7. When the crash was the result of an infrastructure failure, falling trees, rocks, or other debris; or

8. When the CMV was struck by cargo or equipment from another vehicle.

As proposed in the July 2016 notice, FMCSA will use the preventability standard in 49 CFR part 385, Appendix B: “If a driver, who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.”

Conviction Requirement

FMCSA proposed that evidence of a conviction, as defined in 49 CFR 383.5 and 390.5, be required to document that the crash was not preventable by the motor carrier or driver. However, the vast majority of commenters opposed this requirement, including Richard Metz, Douglas B. Marcello, Vigillo, Knight Transportation, Greyhound, Advocates for Highway and Auto Safety (Advocates), Truck Safety Coalition (TSC) and the National Ready Mixed Concrete Association. Reasons cited included the amount of time that courts take to adjudicate cases, and the fact that, when the other driver dies in the crash, there is no prosecution. In addition, some commenters pointed out that the courts make a determination of “at fault” which has a definition different from “preventable.”

After consideration of this feedback, FMCSA will not require evidence of a conviction before processing crash preventability requests in the demonstration program. The Agency will, however, review conviction information, if provided.

Documents to be Submitted

In the July 2016 notice, FMCSA proposed that the RDRs should include all available law enforcement reports, insurance reports from all parties involved in the

crash, and any other relevant information. Douglas B. Marcello, Vigillo, and the Owner Operators Independent Driver Association (OOIDA) noted that receiving insurance reports from other parties is unlikely and should not be required. In addition, Robert Spikes cited a crash where the insurance company paid because it was more cost effective than going to court. Comments also indicated that the Agency should accept other evidence, including videos.

Therefore, FMCSA will not require someone submitting a crash preventability RDR to include any specific documentation from third parties, such as insurance companies, but it will be incumbent on the submitter to provide sufficient documentation that a crash was not preventable. The Agency will consider all relevant evidence submitted.

The burden is on the submitter to show by compelling evidence that the crash was not preventable. However, in these and all crashes, FMCSA reserves the right to request additional information on the crash, which may include any documentation the carrier is required to maintain under the Agency's regulations. Failure to submit documents requested by the Agency may cause the RDR to be closed without a preventability determination.

On August 1, the Agency's DataQs system will accept videos 5 MB or smaller in specific video container formats, including MP4, MPG, MKV, AVI, MPEG, and WMV file types. These file types will be accepted in this demonstration program.

Re-Opening RDRs

If, during the demonstration program, a submitter receives a determination that the crash was preventable or undecided, or the RDR is closed for failure to submit

additional requested documents, the RDR may be re-opened once and the request reconsidered by FMCSA if additional documentation is submitted.

Out of Service Violations

The Agency proposed that a crash would be found preventable if documentation showed that the CMV driver was in violation of an out of service (OOS) regulation at the time of the crash, e.g., the driver had exceeded his/her hours of service limits. In addition, FMCSA advised that the crash would be considered preventable if the post-crash inspection revealed that an OOS violation existed prior to the crash.

United Vision Logistics asserted that an OOS violation should not be determinative unless it was a contributing factor to the crash. Transportation Safety Services also indicated that crashes should not be considered preventable due to OOS violations.

While some commenters did not want other violations to impact the crash preventability decision, the Agency is retaining this requirement in the demonstration program consistent with the Agency's current preventability review procedures. Operations in violation of an OOS regulation demonstrate a disregard for safety and compliance. These crashes were preventable because the vehicle and/or driver should not have been operating. Therefore, if a vehicle and/or driver was operating with any OOS condition under the North American Standard OOS Criteria at the time of the crash, the RDR will result in a preventable determination, because the vehicle and/or driver should not have been on the roadway because of an OOS condition. Additionally, if the motor carrier was in violation of an operations OOS order, the crash will be determined to have been preventable.

Display of Crashes in FMCSA Systems

In the July 2016 Federal Register notice, the Agency proposed that it would remove crashes determined to be “Not Preventable” from the motor carrier’s public SMS display. The Agency noted that Section 5223 of the Fixing America’s Surface Transportation Act, Pub. L. 114-94, prohibits the Agency from making available to the general public information regarding crashes in which a determination is made that the motor carrier or the CMV driver is not at fault.

In response to the Agency’s proposal to remove not preventable crashes from the public SMS display, commenters correctly stated that the Agency was improperly equating a finding of “not preventable” with a finding of “not at fault.” Advocates stated that determinations of fault are “the province of the legal system” and noted that independent investigations of a crash may reach different fault conclusions. Advocates advised that using “only a limited amount of information about the incident, and without all of the benefits provided to a jury during a civil trial, including going to the scene, is grossly misguided.” The TSC added that the State court systems are responsible for making determinations of fault. ATA advised that, “The goal of this process should not be to definitely declare fault, but to identify the predictive value of crashes in the same way the agency does with violations.”

Fault is generally determined in the course of civil or criminal proceedings and results in the assignment of legal liability for the consequences of a crash. By contrast, a preventability determination seeks to identify the root causes for a crash and is used to prevent the same type of crash from re-occurring. A preventability determination is not a proceeding to assign legal liability for a crash. Because preventability determinations are

distinct from findings of fault, Section 5223 does not prohibit the public display of not preventable crashes.

The demonstration program is intended to analyze preventability. The Agency believes that the public display of all crashes, regardless of the preventability determination, provides the most complete information regarding a motor carrier's safety performance record. The Agency is committed to the open and transparent reporting of safety performance data. Therefore, during the demonstration program, not preventable crashes will continue to be listed on the public SMS site. However, the review of the crash, and the subsequent determination, will be clearly noted as described below. In addition, during the demonstration program, the motor carrier's Crash Indicator BASIC percentiles for motor carriers logged into the SMS, FMCSA, and law enforcement users will show percentiles with and without the crashes determined to be not preventable.

During the demonstration program, changes in SMS will not be reflected in the Agency's mobile applications such as the SaferBus and Query Central (QC Mobile) apps or the Pre-employment Screening Program.

Weighting of Not Preventable Crashes

FMCSA considered weighting crashes determined to be preventable with a higher weight in the SMS to see the impacts to the Agency's crash correlation models. YRC Worldwide, Inc. and OOIDA expressed concerns about weighting crashes determined to be preventable. It was noted that this might discourage participation in the demonstration program. As a result, FMCSA will not use a higher severity weighting for any crashes determined to be preventable for any SMS calculations during the demonstration program. However, the Agency's analysis of the demonstration program will review

these crashes and include severity weight options to determine impacts on crash correlation.

Preventability Decisions

The Agency did not receive comments requesting changes to the three proposed preventability decisions. The three preventability decisions will remain “Not Preventable,” “Preventable,” and “Undecided.” FMCSA clarifies below how these decisions will be displayed:

1. Not Preventable - The public display of SMS will include a notation that reads, “FMCSA reviewed this crash and determined that it was not preventable.” For logged-in users (motor carriers viewing their own data, FMCSA, and law enforcement users), two Crash Indicator BASIC percentiles will be calculated – one with and one without the not preventable crash(es).
2. Preventable – The public display of SMS will include a notation that reads, “FMCSA reviewed this crash and determined that it was preventable.”
3. Undecided - In these cases, the documentation submitted did not allow for a conclusive decision by reviewers. When crash reviews are undecided, SMS will include a notation that reads, “FMCSA reviewed this crash and could not make a preventability determination based on the evidence provided.”

In addition, if a submitter fails to provide documents requested by FMCSA, the RDR will be designated in DataQs as “Closed Due to Non-Response” without any notation in the public display of SMS.

Input from the Public

The July 2016 Federal Register notice proposed to allow public input on any crashes with a proposed not preventable determination. United Vision Logistics and the National Motor Freight Traffic Association do not believe that an opportunity for public input should be available in the program. The American Association for Justice advised that the public must have access to the data used to make a determination.

The opportunity to collect information from other parties is critical to determining the impacts and costs of this program. Therefore, during the demonstration program, if a crash is reviewed and results in a preliminary finding that it was not preventable, the crash report number, U.S. DOT number, motor carrier name, crash event date, crash event State and crash type will be listed on the Agency's DataQs website.

Any member of the public with documentation or data to refute the proposed finding will have 30 days to submit the documentation through the DataQs system at <https://dataqs.fmcsa.dot.gov>. Information on how to submit additional documentation is available at <https://www.fmcsa.dot.gov/safety/crash-preventability-program>.

Any new documents or data will be reviewed and considered before FMCSA makes a final determination. Final determinations will be reflected on SMS within 60 days of the final decision.

DataQs

Motor carriers and drivers will submit crash preventability RDRs through the Agency's DataQs system. DataQs has been modified to provide this functionality. The DataQs system is available at: <https://dataqs.fmcsa.dot.gov>.

Information on how to submit a crash preventability RDR is available on the Agency's website at <https://www.fmcsa.dot.gov/safety/crash-preventability-program>.

It should be noted that crash preventability RDRs for crashes that predate this program or that do not correspond to the crash scenarios listed above will not be processed. However, motor carriers and drivers should continue to submit RDRs through DataQs when crashes are assigned to the wrong carrier or the crash did not meet the definition of a recordable crash, using processes currently in place.

Reviewers

FMCSA will use contract resources to complete two stages of review within the DataQs system. In stage 1, the reviewer will collect all documents related to the crash from the submitter and FMCSA systems.

In stage 2, an experienced crash report reviewer will evaluate all of the documents from the submitter and FMCSA systems, including the MCMIS crash information. It should be noted that if an RDR is submitted before the MCMIS crash report is received, the evaluation will be put on hold and the submitter will be advised.

The stage 2 reviewer will confirm that the crash meets one of the crash types noted above. Based on the evidence reviewed, the stage 2 reviewer will make a recommendation to FMCSA as to whether compelling evidence demonstrates that the crash was not preventable. The FMCSA reviewer will review the evidence considered by the stage 1 reviewer and the stage 2 recommendation. If FMCSA agrees with the recommendation of not preventable, the crash will be posted for public input as noted above. If the recommendation is for a determination that the crash was preventable or that the information submitted was insufficient to support a determination, and the FMCSA reviewer agrees, the determination of “Preventable” or “Undecided” would be noted in the public SMS display as described in the “Preventability Decisions” section above

added to the corresponding crash in SMS. Changes would be reflected on SMS within 60 days.

Quality Controls

At the onset of the program, all RDRs will be checked by a second reviewer during stage 2. If FMCSA's determination differs from the stage 2 recommendation, an additional final reviewer will be utilized and make a recommendation to FMCSA.

Throughout the program, FMCSA will evaluate the quality control process. For continued consistency of crash preventability determinations, a percentage of RDRs will be reviewed before a recommendation is made to FMCSA.

Fraudulent Requests

In accordance with the Agency's existing DataQs program, any intentionally false or misleading statement, representation, or document that is provided in support of an RDR may result in prosecution for a violation of Federal law (18 U.S.C. 1001).

Agency Use of Data

Under 49 U.S.C. 504(f), "No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation." The crash preventability determinations made under this program are intended only for FMCSA's use in determining whether the program may improve the Agency's prioritization tools. These determinations are made on the basis of information available to FMCSA at the time of the determination and are not appropriate for use by private parties in civil

litigation. These determinations do not establish fault or negligence by any party and are made by persons with no personal knowledge of the crash.

In addition, the crash preventability determinations made under this program will not affect any carrier's safety rating or ability to operate. FMCSA will not issue penalties or sanctions on the basis of these determinations, nor do they establish any obligations or impose legal requirements on any motor carrier. These determinations also will not change how the Agency will make enforcement decisions.

Information submitted about a crash as part of this demonstration program may be shared with the appropriate FMCSA Division Office for further investigation. Likewise, if an investigation reveals additional information about a crash for which the demonstration program made a preventability determination, this information may be shared within the Agency and the crash subjected to further review.

Throughout this demonstration period, FMCSA will maintain data so that at the conclusion of the test, the Agency can conduct certain analyses. It is expected that the Agency's analyses would include, but not be limited to, the cost of operating the test and its extrapolation to a larger program; future crash rates of carriers that submitted RDRs, future crash rates of motor carriers with not preventable crashes, and impacts to SMS crash rates and improvements to prioritization. The analysis will be used to examine ATA's assertion that crashes of these types are not preventable and that removing these crashes from the motor carriers' records would result in a better correlation to future crash risk, and inform future policy decisions on this issue.

Demonstration Period

FMCSA will accept RDRs for crashes occurring on or after June 1, 2017.

FMCSA will begin accepting RDRs through DataQs for this demonstration program on August 1, 2017. This will provide the Agency with time to conduct outreach to the industry and for motor carriers or drivers to collect needed documents for submission.

This demonstration program is expected to last a minimum of 24 months.

Other Issues

Prioritization

For the purpose of prioritizing motor carriers for safety interventions, FMCSA will continue to use all crashes during the demonstration program.

Safety Fitness Determination Rulemaking

A few commenters asked how this program would impact the Agency's Safety Fitness Determination (SFD) notice of proposed rulemaking (NPRM) published on January 21, 2016. Preventability determinations made as part of this demonstration program will not be used for the purpose of safety ratings under the Agency's existing safety fitness determination process. The Agency will continue to make preventability determinations under its current procedures in 49 CFR Part 385, Appendix B, when a crash adversely affects a carrier's safety rating. If a carrier disagrees with the calculation of the crash factor during a compliance review the carrier must request removal under the procedures identified in the compliance review report it receives or under the procedures identified in 49 CFR 385.15. The determinations made through this demonstration program will only be used to determine the impacts of preventability determinations on the effectiveness of the SMS in identifying the highest-risk carriers for interventions. Crash determinations made in this demonstration program will not be considered as part

of any Agency action or proceeding that may impact a carrier's safety rating, including safety rating upgrade requests.

In addition, FMCSA published a notice withdrawing the SFD NPRM on March 23, 2017.

Opposition

While most comments to the July 2016 Federal Register notice supported the program, there were four commenters that expressed opposition on the program in its entirety. The TSC advised that it "firmly opposes" the program. TSC and Road Safe America believe that FMCSA should not expend time or money pursuing this program, and that instead the Agency should focus on regulations that will reduce crashes. TSC, Road Safe America, and the American Association for Justice want all crashes to be in SMS. The Coalition of Seven added that the "test study as proposed...is of marginal utility and would not materially improve the accuracy of the crash data."

The purpose of this demonstration program, however, is to gather data that the Agency will use to examine the feasibility, costs, and benefits of making crash preventability determinations. The data gathered through the demonstration program will

allow the Agency to better evaluate the utility of making crash preventability determinations. As a result, FMCSA is moving forward to implement this demonstration program.

Issued under the authority delegated in 49 CFR 1.87 on: July 19, 2017

Daphne Y. Jefferson,
Deputy Administrator.

[FR Doc. 2017-15833 Filed: 7/26/2017 8:45 am; Publication Date: 7/27/2017]